# IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

## COMPANY APPLICATION No. 291 of 2001

**For Approval and Signature:**

**HONOURABLE MR.JUSTICE M.R. SHAH**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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**O.L. OF JUBILLE MILLS EMP. CO.-OP. CREDIT SOCIETY LTD. - Applicant(s)**

**Versus**

**O.L. OF JUBILLE MILLS LTD. & 5 - Respondent(s)**

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**Appearance** :
MR DS VASAVADA for Applicant(s) : 1,
OFFICIAL LIQUIDATOR for Respondent(s) : 1,
SINGHI & CO for Respondent(s) : 2,
MR RD DAVE for Respondent(s) : 3,
MR PRANAV G DESAI for Respondent(s) : 4, 6,
NOTICE SERVED BY DS for Respondent(s) : 5,

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**CORAM : HONOURABLE MR.JUSTICE M.R. SHAH**

**Date : 19/06/2006**

**CAV JUDGMENT**

1. The present application has been filed by the applicant - Jubilee Mills Employees' Co-operative Credit Society Limited for appropriate order directing the respondents to pay an amount of Rs.10,65,902=00 to the applicant society.
2. Short facts stated on behalf of the applicant in the Company Application are as under;
3. The applicant Cooperative Society was set up with the object of providing credit to the employees of Jubilee Mills Limited (in Liquidation). As per the arrangement with the erstwhile management, the management was deducting the amount from the wages of each of the employees per month. The management was required to remit the amount so deducted to the applicant – Co-operative Society. That the such deductions were effected upto 30/1/1988. That although the deductions were effected from the wages of the employees, the said deductions were

not remitted to the applicant. That the Jubilee Mills was ordered to be wound up on 5/9/1989. In the initial period, the assets were sold and the assets in the form of loose stock, plant and machinery have been sold and an amount of Rs.4.25 Crores approximately have been realised from the sale of the assets. That the money due and payable to the applicant cooperative societie has been held to be “the Trust Money”. In the case of Baroda Spinning Mills Limited reported in 17 GLR 555, this Court has held that the moneys due and payable to the Co-operative Society is Trust Money and receives the thumbing priority. That the erstwhile management has filed Statement of Affairs as required to be filed under sec.454 of the Companies Act, 1956 and it has been stated in the said Statement of Affairs that the amount of Rs.7,72,392=00 is due and payable to the society as on 30/1/1988. The society is also entitled to charge interest upto 5/9/1989 as Jubilee Mills Ltd. was ordered to be wound up on that day. Thus, adding interest of Rs.2,93,510=00, the amount comes to Rs.10,65,902. The applicant has heavily relied upon the order passed by the learned Single Judge of this Court dtd.30/9/1999 in Company Application No.405 of

1998 in the case of Nutan Mills Employees Co-operative Credit Society Limited Vs. Official Liquidator of Nutan Mills Limited (hereinafter referred to as “the Nutan Mill's case). The present application came up for hearing before the learned Single Judge of this Court (Coram : M.S. Shah, J.) on 6/2/2002 and considering the fact that against the judgement and order passed in the case of Nutan Mills OJ Appeal No.49 of 1999 was pending and considering the order dtd.6/9/2000 passed by the Division Bench of this Court in Civil Application No.192 of 1999 in OJ Appeal No.49 of 1999 involving similar issue, the learned Single Judge by way of interim order directed that the amount of Rs.7,72,392=00 shall be paid by the official liquidator to the applicant society on condition that the applicant society shall keep the same in Fixed Deposit with a Nationalised Bank during the pendency of this application and subject to the further condition that the applicant society shall not encumber such deposit. It appears that accordingly the said amount is lying with the applicant society in a fixed deposit with a Nationalised Bank. That thereafter, by order dtd.25/10/2005, the Official Liquidator was directed to file Report clarifying the

position as to whether the amount over which the claim is made by the applicant was reflected in the Books of Accounts or Statement of Affairs of the Company in Liquidation and as to whether the said amount is transferred to Official Liquidator when the properties of the Company in Liquidation were taken over by the Official Liquidator. That thereafter, the Official Liquidator submitted his Report which will be dealt with hereinafter. That the present application came up for hearing before the learned Single Judge of this Court on 10/1/2006 and in the meantime, the Division Bench of this Court (Coram : R.S. Garg and R.R. Tripathi, JJ) had an occasion to consider the similar issue in the case of Regional Director, E.S.I. Corporation Vs. Official Liquidator, Prasad Mills Limited (hereinafter referred to as""the Prasad Mill's Case") and it was submitted on behalf of the respondent that in view of certain observations made by the Division Bench, the said judgement delivered in the case of Nutan Mill deserves to be re-considered. The learned Single Judge (Coram : R.S. Garg, J.) directed the registry to place this application before the Hon'ble Chief Justice for appropriate orders by observing as under;-

> *"After hearing the parties and on going through both these judgements, I am of the considered opinion that certain observations made in the matter of the Regional Director, E.S.I. Corporation (Supra) would certainly run contrary to the judgement in the matter of Nutan Mills Employees Co-Op.Credit Society Ltd. (Supra). Ordinarily, following the Division Bench's judgement, I would ignore the other judgements of the learned Single Judge, but propriety demands that the judgements of the learned Single Judge be examined by the Division Bench in light of the judgement in the matter of Regional Director, E.S.I. Corporation (Supra)..."*

4. It appears from the record that thereafter, the present application was placed before the Hon'ble the Chief Justice to pass order to place the matter before the appropriate Bench and the Hon'ble Chief Justice has passed an order to place the matter before the Single Judge Bench and that is why the present application is heard by the learned Single Judge. At this stage, it is also required to be noted that even in the case of Prasad Mills in Company Application NO.216 of 1997 which came to be decided and disposed of by the Division Bench, it was initially placed before the learned Single Judge which came up for hearing before the learned Single Judge of this Court (Coram ; K.M. Mehta, J.) and considering the fact that Nutan Mill's Case was pending before the Division Bench wherein similar issue was involved, the learned Single Judge directed that it will be

appropriate that the said application is heard by the Division Bench. It is also required to be noted that the OJ Appeal in the case of Nutan Mill being OJ Appeal No.49 of 1999 came up for hearing before the Division Bench which came to be dismissed for default. However, the matter in the case of Prasad Mills came to be heard by the Division Bench which will be referred to hereinafter.

5. Before considering the rival submissions made on behalf of the respective parties, the judgement of the Division Bench in the case of Prasad Mills reported in 2005 (3) GLR 2019 in Company Application No.216 of 1997 in Company Petition No.205 of 1996 and other allied Company Applications are required to be considered and referred to. The dispute before the Division Bench was as to whether the amount standing to the credit of the workers regarding their contribution to the Employees State Insurance Act in the Books of Mill Company (in Liquidation) is impressed with character of a trust, and hence, it does not form part of the assets of the Company and the Liquidator is bound to pass the same in priority before any distribution of assets of the Company is made by him? After considering the rival

submissions made on behalf of the parties, and considering the various provisions of the Companies Act, the Division Bench in para 13 and 14 of the said judgement observed as under;

> *"13.So far as question Nos.2 and 3 referred for answer are concerned, in our considered opinion, before taking any priority in the matter of recovery or to get the money straight from the Official Liquidator, it would be necessary for E.S.I. Corporation to prove to the satisfaction of the Court that the amount due to them comes within the scope of Sec.530(A) of the Companies Act. After the Company Court is satisfied, then it will have to enquire, that whether the amount, so deducted from the wages payable to the employees was kept in a separate account and whether such amount was transferred to the Official Liquidator. In a given case, if no cash amount is transferred to or is received by the Official Liquidator, then the question of the amount standing to the credit of the workers would lost its importance. Even otherwise, if the E.S.I. Corporation wants to say that certain properties were purchased from the amount of the contribution received by the employer, and thereafter, a mortgage was created over the same, and that became the subject of security for the secured creditors, then the Corporation will have to lead positive evidence to the satisfaction of the learned Company Judge, who, if records a finding that a particular property was purchased from the contribution money, and thereafter, a mortgage was created over it, would certainly be entitled to give priority to the dues of the E.S.I. Corporation. Simply because certain amounts have been deducted from the wages payable to the workmen/employees, the same would not become the security in the hands of the Official Liquidator. In the present case, it is to be seen that the mortgages were created somewhere in the year 1975 and the deductions are from the year 1979 to the year 1993. Much before the liability to make the payment of the contribution arose, mortgages were already created."*
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> *"14. In reference to question NO.2, we shall only say that if the amount is kept in a separate account with the Company, then the same shall be treated to be in trust and it shall not form part of the assets of the Company and the Liquidator will be required to bound to pay the said amount in priority to the E.S.I. Corporation before any distribution of the assets of the Company is made by him, but in a case where such amount is not kept in cash in any separate account and the Official Liquidator does not receive the said amount, then, the procedure provided under Sec.529(A), read*

*with Sec.530 of the Companies Act will have to be followed."*"

Thus, the Division Bench has specifically held that if the amount is kept in a separate account with the company and it shall not form part of the assets of the Company and the liquidator will be bound to pay the said amount in priority to the ESI Corporation before any distribution of the assets of the Company is made by him; but in case, where, the said amount is not kept in cash in any separate account and the official liquidator does not receive the said amount, then, the procedure provided under sec.529 and 530(A) of the Companies Act will have to be followed. In backdrop of the order passed by the Division Bench, the contentions on behalf of the rival parties are required to be considered.

6. Mr.D.S. Vasavada, learned advocate for the applicant society has submitted that tri-parte arrangement between the management, credit society and the workers was that the amount was to be deducted from the wages towards the installment of loan. He has also further submitted that so long as the amount is not remitted it partakes the character of wages and consequently it is a trust money or at

the worst it is the wages. The Statement of Affairs filed by the Directors show the entry at Sr.No.57 that an amount of Rs.7,72,329/- as on the date of 30/1/1988 is shown due and payable by the ex-directors. This is nothing but deduction which was effected and it is also proved by the deduction in the Wage-Register. It is also further submitted that in view of the judgement in Nutan Mill's case which has become final and the facts being same, the judgement in the Nutan Mill's Case will squarely apply to the facts of the present case and therefore, the Company Application be allowed. Mr.Vasavada, learned advocate for the applicant has further submitted that the Division bench while deciding the Prasad Mill's Case had, in fact, remitted the matter to the learned Single Judge and, therefore, the dues of the cooperative societies cannot be equated with the dues of ESI Corporation. He has also further submitted that in the case of Nutan Mill, the learned Single Judge has specifically held that the dues of the credit cooperative society are trust money even if the liquidator has not received the said amount in form of cash while taking the possession of the Company (in Liquidation). It is also further submitted that

against the judgement of the learned Single Judge in the case of Nutan Mill, OJ Appeal was preferred being OJ Appeal NO.49 of 1999 in which, even Civil Application No.192 of 1999 for interim relief was filed, which came up for hearing before the Division Bench and the Division Bench directed that the amount in question may be handed over to the respondent society and the respondent shall deposit the amount in Fixed Deposit Receipt with Nationalised Bank and according to him, the said amount has been paid over to the said society. It is also further submitted that the said OJ Appeal No.49 of 1999 came up for hearing before the Division Bench and the appellant did not prosecute the appeal and the appeals were dismissed. It is also further submitted that the very counsel who are appearing in the present Company Application on behalf of the respondent were appearing in the said OJ Appeal and if they were present, they could have also submitted that they are also supporting the appeal and they could have made their submissions. However, they invited order and the appeal came to be dismissed. Thus, according to him the order passed by the learned Single Judge in the case of Nutan Mill has attained finality. It is also

further submitted by him that since the order passed in the case of Nutan Mill has become final, the respondents are estopped from raising any contention that dues of the ESI Corporation and the dues of the cooperative societies are the same. He has also further submitted that the dues of the ESI Corporation are held to be the revenue by the Division Bench under sec.530 of the Companies act, 1956 and the observations made in para 13 of the judgement are obitterdicta and they are side observations, but the ratio of the judgement is that the dues of the Corporation are “revenue”, whereas the dues of the credit society acquires character of “trust money”, despite the fact that the liquidator had not received the money in cash. He has also further submitted that whether the money was utilized for the purchase of machinery or for working capital is of no consequence but the fact is proved that the money was deducted from the wages and the deductions have been shown to the official liquidator, but according to Mr.Vasavada, the official liquidator has filed hasty report in not indicating that in fact the deduction has been effected. The Wage Register is the conclusive proof that the deduction

has been effected. He has also further submitted that in view of Nutan Mill Case, the application deserves to be allowed. When a pointed question was asked to Mr.Vasavada, learned advocate appearing on behalf of the applicant to produce and/or to point out the tri-parte agreement under which the amount was deducted, it is submitted by him that such arrangement of remittance i.e. deducting the amount from the wages and sending it to the credit society was uniformly applied in all textile units and, therefore, it may be presumed that the arrangement in the cases of Nutan Mill and Jubilee Mill is the same. He has also further submitted that the fact in the cases of ESI Corporation (Prasad Mill's Case) and facts in the present case are different and, therefore, the judgement of the Division Bench cannot be applied to the facts of the present case. Relying upon the judgement in the case of the State Financial Corporation and another Vs. M/s.Jagdama Oil Mills and another, reported in AIR 2002 SC 834 more particularly Head-Note-E, it is submitted that the judgement is required to be read in the facts of the case on hand. Relying on para 19 of the said judgement he has submitted that Courts should not

place reliance on decisions without discussing as to how the factual situation fits in with the facts situation of the decision on which reliance is placed. The observations must be read in the context in which they appear. Judgements of Courts are not to be construed as statutes. Submitting accordingly, it is requested to read the judgement of the Division Bench in the facts of that case only.

7. It is further submitted that assuming worst against the applicant since the amount was not remitted by the erstwhile management to the society as on 30/1/1998, it partakes character of the wages and therefore, it should also be paidover to the workmen and it should be added in the total claim of the workmen.

8. In short, Mr.Vasavada learned advocate for the applicant society has relied upon the judgement of the learned Single Judge in the case of Nutan Mill, wherein it is held that the money in the hand of Company on deduction of the amount under the arrangement / agreement had been impressed with a character of trust money and the credit society can make a preferential claim and therefore, it is requested to allow the present application and grant

relief as prayed for.

9. The application is seriously opposed and contested by the respondents. Mr.Singhi, learned advocate appeared on behalf of the respondent No.2, Mr.Rajesh Dave, learned advocate is appeared on behalf of respondent No.3, Mr.P.G. Desai, learned advocate appeared on behalf of respondent Nos.4 and 6 as well as the learned official liquidator was appeared on behalf of the Company in Liquidation and this court has also considered Report filed by the Official Liquidator.

10. In the aforesaid Report, official liquidator has submitted that the applicant society has moved an application for seeking certain directions, out of which one of the directions is to direct the official liquidator to pay an amount of Rs.7,72,392=00 being the amount deducted by the erstwhile management from the wages of the workers on behalf of the credit society, which was deducted by the management but not deposited with the credit society. It is also further submitted in the Report that looking to the Statement of Affairs filed by the Ex-Director of the Company, it is seen from page No.199 that Ex-Director disclosed at Sr.No.57 Account No.109064 that a sum of

Rs.7,72,392=00 is due and payable w.e.f. 30/1/1988 to the applicant society under the head of unsecured creditors. It is also further submitted by him that such type of claim is not considered as secured claim and does not attract the provisions of Sec.529(A) of the Companies Act, 1956. It is also further submitted by the official liquidator in his last Report which is filed pursuant to the order passed by the learned Single Judge of this Court dtd.25/10/2005 directing the official liquidator to file Report clarifying as to whether the amount over which the claim is made by the applicant is reflected in the Books of Account or the Statement of Affairs of the Company and as to whether the said amount is transferred to the official liquidator when the properties of the Companies were taken over by the official liquidator. The official liquidator has submitted that he has verified the records of the Company with the assistance of the members of the applicant society and it is seen from the Pay Register that at the time of disbursement of salary of the workers, deduction was made towards the monthly contribution and repayment of loan installment of the applicant society. It is also further submitted in the report that the official liquidator

could not find any entry in the books of the Company reflecting that the amount so deducted by the Company from the salary of the workers towards the applicant society, was in turn actually remitted to the applicant society. It is also further submitted by him that an amount of Rs.7,72,392=00 deducted by the applicant from the salary of the workers did not come to the hands of the official liquidator at the time of taking over possession of the assets and properties of the Company pursuant to the winding up order dtd.30/10/1988.

It is submitted by Mr.Singhi, learned advocate appearing on behalf of the respondent No.2 – ICICI Bank Ltd., one of the secured creditors, that the official liquidator in his report dtd.28/12/2005 has stated that though entry could be found in the Books of Accounts reflecting amount so deducted from the wages of the workers towards the deduction of applicant society and that the applicant is shown as creditor of Rs.7,72,392=00, but the dues of the applicant society is classified and grouped in the dues of the unsecured creditors. Therefore, it is submitted that in the report of the official liquidator,

it is factually noted that though entry is found in the Books of accounts and dues which have been shown in the Statement of Affairs is shown under the head of unsecured creditors and therefore, the dues of the applicant can be paid only after the dues of the secured creditors and workers are paid under sec.529 and 529(A) of the Companies Act, 1956.

Relying upon page 13 of the judgement of the Division Bench of this Court in the case of Prasad Mill reported in 2005 (3) GLR 2019, it is submitted that as held by the Division Bench if such amount is not kept separate and does not come in the hands of the official liquidator then the workers shall not have any priority. It is further submitted by him that in the present case as stated hereinabove, the official liquidator has clearly stated that no such such amount have come in the hands of the official liquidator and therefore, the applicant cannot claim priority. It is further submitted by him that even otherwise the applicant has failed to prove that which particular property was purchased by the Company in liquidation out of the said fund and therefore also, the applicant cannot claim priority from the sale

proceeds. Dealing with the judgement and order passed by the learned Single Judge in Nutan Mill Case reported in 2000(3) CLJ 121, wherein it has been held that the money in the hands of Company has been impressed with the character of trust money and therefore, the credit society can make preferential claim, it is submitted that in the facts of the case of Nutan Mill under tri-parte agreement between workers, cooperative society and Mill Company, the said Mill Company used to deduct the amount at a specified date and to transmit the same to the credit society against the dues of the credit society. It is also further submitted by him that in the facts of that case every member was required to contribute compulsorily the requisite amount as set up in the Bye-laws of the society as Savings. For the purpose of advancing loan to the members of the applicant society and the smooth recovery thereof, a tri-parte agreement came to be worked out between the workers, cooperative society and Mills Company under which, it was agreed that the society would advance loan to its members and the loan would be repayable by monthly installment and that the installment amount and the interest over the same

would be deducted from the wages. It is further submitted that in the present case also it is accepted by the applicant that tri-parte agreement between the workers, cooperative society and Mill Company was entered into on the same terms and conditions as stated hereinabove. It is further submitted by him that the amount of installment deducted towards the loan advance by the society to the workers and payment to be made to the credit society by the Company in no manner can be termed as wages or can be considered a wages due and payable to the workers. It is submitted that the credit society would be creditor if at all, of the company and not workers. Therefore also, neither is there any fund with the workers nor can provision of sec.529 read with sec.529(A) have any application in the facts of the case. It is also further submitted by him that while determining the Nutan Mill's case, the learned Single Judge considered two decisions in his judgement namely RE Kayford Ltd. (1975) 1 ALL England Report and Chase Manhattan Bank Vs. Israel-British Bank (1979) 3 ALL England Report page 1025, and the facts in the aforesaid two decisions were that the Company's Bank opened a dormant deposit

account in the company's name and the account had a credit balance. It was submitted that in RE Kayford Ltd.(SUPRA), the Company carried on a mail-order business and the customers either paid the full purchase price or a deposit when ordering goods. The Company, which went into financial difficulties, being concerned for the customers who had sent and were sending money for goods, took advice on how the customers right be protected in the event of the company becoming insolvent and it was advised to open a separate bank account to be called “Customers' Trust Deposit Account”, into which all further sums of money sent by the customers for goods not yet delivered were to deposited. In that circumstances, it was held by the Chancery Division that in the circumstances a trust had been created and that all requisites of a valid trust of personality were present and the Company had manifested a clear intention to create a trust in favour of the customers. It is also further submitted by him that inspite of the aforesaid facts, the learned Single Judge decided that the money held by the Company was trust money and that it has got priority. It is also further submitted by him that as such the question is

already answered now by the Division Bench of this Court in the case of Prasad Mill and relying upon para 13 and 14 of the said judgement, it is submitted that as held by the Division Bench, it would be necessary by the ESI Corporation to prove to the satisfaction of the Company Court that the amount due to them so deducted from the wages payable to the employees was kept in a separate account and that such amount was transferred to the official liquidator. If no cash amount is transferred to or is received by the official liquidator then the question of amount standing to the credit of the workers would lose its importance. Thus, it is submitted that the Division Bench has specifically held that if the amount is kept in cash in separate account with the Company then the same shall be treated to be the trust money and it shall not form assets of the company and the liquidator will be bound to pay the said amount in priority to the ESI Corporation before any distribution of the assets of the Company is made by him, but in case where the said amount is not kept in cash in separate account, and the official liquidator does not receive the said amount then, the procedure provided under sec.529(A) read with

sec.530 of the Companies Act will have to be followed. It is also disputed by Mr.Singhi learned advocate appearing on behalf of the respondent No.2 that the observations made by the Division Bench are obitterdicta and they are side observations. Submitting accordingly, he has requested to dismiss the present application.

11.Heard the learned advocates appearing on behalf of the respective parties. The question which has been posed for consideration before this Court is as to whether the amount deducted by the Mills Company from the wages of the workers to transmit the same to the applicant credit society to enable it to credit the amount so received in the account of the workmen individually against the dues of the credit society can be considered to be a trust money, for which the applicant credit society can make a preferential claim? And/or whether the applicant credit society can make preferential claim over the money, when the assets of the Mills Company were mortgaged to the secured creditors and/or whether the said amount so deducted partakes the character of wages which is required to be paid over to the workmen by adding in the total claim of the

workmen?.

12.Before considering the rival submissions and contentions, it is required to be noted how the amount is deducted and for what under tri-parte agreement between the workers, workers cooperative society and Mills Company (in Liquidation). The said Mill Company used to deduct the amount at the specified rate, from the workers wages every month, and to transmit the same to the credit society to enable it to credit amount so received in the accounts of the workmen individually against the dues of the credit society. It appears that the workers of the Mills Company (in Liquidation) were the members of the applicant cooperative credit society. It appears that to secure the said amount so that the aforesaid amount can be repaid, an arrangement by way of aforesaid tri-parte agreement came to be entered into by which the amount was to be deducted from the wages of the workmen directly from the Mills Company and was transmitted to the credit society to enable it to credit the amount so received in the Account of the workmen individually against the dues of the credit society. Therefore, on deducting the said amount from the wages and

crediting into the account of the society,it becomes the amount of the society and it losses the character of wages of individual workmen. As stated hereinabove, the purpose of the said arrangement is to secure the amount of loan paid to the concerned workmen and the amount so transmitted to the credit society be adjusted against the dues. Now in this background, the aforesaid questions are required to be considered.

13.It is the contention on behalf of the applicant credit society that the erstwhile management has filed Statement of Affairs and in the said Statement of Affairs, it has been stated that the amount of Rs.7,72,392/- is due and payable to the applicant society as on 30/1/1988 and it is the contention on behalf of the applicant that it is a trust money and therefore, the applicant society is entitled to charge interest on the same. At this stage, the report submitted by the official liquidator dtd.20/12/2005 is required to be considered. It has been submitted in the report that the official liquidator could not find any entry in the books of the Company reflecting that the amount so deducted by the Company from the salary of the workers towards the deduction of

the applicant society was in turn actually remitted to the applicant society. It has also been further submitted in the report that on perusal of the Statement of Affairs filed by the Ex-Directors of the Company under sec.454 of the Companies act, it is observed that the applicant society is shown as creditor therein for an amount of Rs.7,72,392.00. It may be relevant to state that these dues of the applicant society are classified and grouped in the dues of unsecured creditors of the ex-directors of the Company. In the Statement of Affairs, it has also been stated that the amount of Rs.7,72,392.00 deducted from the salary of the workers did not come to the hands of the official liquidator at the time of taking over the possession of the assets and properties of the Company pursuant to winding up order dtd.13/10/1988. Thus, the facts emerges from the said report is that there is no entry in the books of the Company that the amount so deducted was in turn actually remitted to the applicant society and that the said amount did not come to the hands of the official liquidator at the time of taking over the possession of the assets. Nothing is on record that the said amount was kept in separate account by the

Company (in Liquidation) and/or was kept in cash in any separate account.

14.Mr.Vasavada, learned advocate appearing on behalf of the applicant has heavily relied upon the judgement and order passed by the learned Single Judge of this Court in the case of Nutal Mill in Company Application No.405 of 1998 dtd.30/9/1999 and has submitted that on dismissal of the OJ Appeal filed against the judgement and order passed by the learned Single Judge, the judgement and order of the learned Single Judge is confirmed by the Division Bench and therefore, considering the judgement and order of the learned Single Judge in the case of Nutan Mill, the amount so deducted from the wages of the workmen which was required to be transmitted to the applicant credit society is to be treated as trust money and therefore, the applicant credit society would have priority above all.

15.At this stage, it is required to be noted that the OJ Appeal No.49 of 1999 against the judgement and order passed by the learned Singel Judge in the case of Nutan Mill is in fact not dismissed on merits, but it is dismissed for default and therefore, it cannot be said that the judgement and order passed by the

learned Single Judge in the case of Nutan Mill is confirmed by the Division Bench on merits. The learned advocate appearing on behalf of the respondents have heavily relied upon the judgement and order passed by the Division Bench of this Court in the case of Prasad Mills Case reported in 2005(3) GLR 2019 more particularly para 13 and 14 of the judgement which as per the learned advocate of the applicant are obitterdicta and they are side observations and according to the learned advocate appearing on behalf of the applicant, the ratio of the judgement is that the dues of the ESI Corporation are revenue whereas the dues of the credit society acquires character of trust money despite the fact that the liquidator had not received the cash. On consideration of the entire judgement of the Division Bench in the case of Prasad Mill, the submission made on behalf of the applicant cannot be accepted. The question Nos.2 and 3 were specifically framed and one of the questions was that whether the amount standing to the credit of the workers regarding their contribution to ESI Act in the Books of the Mill Company (in Liquidation) is impressed with the character of trust money and hence it does not

form part of the assets of the Company and the liquidator is bound to pass the same in priority before any distribution of the assets of the Company is made by him? And the Division Bench in the said judgement while answering question Nos.2 and 3 has specifically held that before claiming any priority in the matter of recovery or to get money from the official liquidator, it would be necessary for the ESI Corporation to prove to the satisfaction of the Court that the amount due to them comes within the scope of Sec.530(A) of the Companies Act, 1956 and after the Company Court is satisfied then it will have to inquire that whether the amount so deducted from the wages payable to the employees, was kept in a separate account and whether the said amount was transferred to the official liquidator or is received by the official liquidator, otherwise the question of amount standing to the credit of the workers would lose its importance. It is ultimately held by the Division Bench in para 14 that if the amount is kept in a separate account with the Company then the same shall be treated to be in the trust and it shall not form part of the assets of the Company and the liquidator will be required to bound to pay the said

amount in priority to the ESI Corporation before any distribution of the assets of the Company is made by him. But in a case where such amount is not kept in cash in any separate account and the official liquidator does not receive the said amount then the procedure provided under sec.529(A) read with sec.530 of the Companies Act will have to be followed. Therefore, the Division bench has given specific finding and the same cannot be said to be obtterdicta and/or passing observations. The amount deducted by the Mills Company from the wages of the employees to be transmitted to the credit society for adjustment of the loan taken by the concerned workmen can be equated with the amount deducted from the wages of the employees for the purpose of ESI Act and/or the amount standing to the credit of the workers regarding their contribution to ESI Act in the Books of the Mills Company (in Liquidation). Thus, now considering the facts of the present case and the report submitted by the official liquidator, first of all, it is required to be noted that there is nothing on record to suggest that the aforesaid amount of Rs.7,72,92 was kept in a separate account and the same has been received by the official liquidator at

the time of winding up. Therefore, considering the judgement of the Division Bench in the case of Prasad Mill, the contention on behalf of the applicant that it is trust money and the applicant credit society would have a priority above all, inclusive of secured creditors, cannot be accepted. Therefore, against the judgement of the learned Single Judge in the case of Nutan Mill, now there is judgement of the Division Bench in the case of Prasad Mill and as a Single Judge, I am bound by the Judgement and order passed by the Division Bench and therefore, bound to follow the same and therefore, the contention on behalf of the applicant relying upon the judgement and order passed by the learned Single Judge in the case of Nutan Mill cannot be accepted.

16. As stated hereinabove, the amount deducted from the wages of the workers pursuant to the tri-parte agreement between the workers, workers cooperative society and Mills Company and workers of the Mill Company formed credit society and the workers are entitled to loan from the said credit society and the amount so deducted from the wages was required to be transmitted to the credit society to enable it to credit amount so received in the accounts of the

workmen individually against the dues of the credit to society. Therefore, with a view of facilitate the credit society to get the amount, the amount was transmitted to the same and on such transmission, the said amount becomes the amount of the credit society which was required to be adjusted against the loan taken by the individual workmen. Nothing is on record that as such in fact any amount has been transmitted to the credit of the society apart from the fact that the same has been kept in a separate account or not. Therefore, assuming that the aforesaid amount was deducted by the Company than in that case, the credit society becomes unsecured creditor like other unsecured creditors who are entitled to recover the said amount from the Mills Company and in fact even in the Statement of Affairs submitted by the Ex-Directors of the Mills Company, the same has rightly been shown in the Account of unsecured creditor and therefore, as such, the applicant credit society is required to submit the claim before the Official Liquidator like other unsecured creditors and can get the amount accordingly.

17. Alternatively it is submitted on behalf of

Mr.Vasavada, learned advocate appearing on behalf of the applicant that the amount so deducted be treated as wages and therefore, the same may be added in the dues of the workmen qua wages and the same may be paid accordingly under sec.529(A) of the Companies Act. Such a contention cannot be accepted. Moment the amount is deducted from the wages of the workers for transmitting it to the credit society under tri-parte agreement to enable it to credit the amount so received in the account of the workmen individually against the dues of the credit society,it losses the character of wages and it becomes the amount of the credi society for adjustment of dues towards the loan taken by the individual workman. Therefore, the contention on behalf applicant that the same may be treated as wages cannot be accepted and has no substance.

18.For the reasons stated hereinabove, and considering the judgement of the Division Bench of this Court in the case of Prasad Mill (Supra) and the fact that no amount has come in the hands of the Official Liquidator at the time of winding up, the applicant cannot claim priority and therefore, the application is required to be dismissed and is accordingly

dismissed.

(M.R.SHAH,J.)

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